TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 393

JAMES DUNN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 21, 1931

CERTIORARI GRANTED NOVEMBER 2, 1931

(36,207)

(36,207)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 10, 1931

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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Attorneys for Appellee:

GEO. J. HATFIELD, Esq., U. S. Attorney.

ALBERT E. SHEETS, Esq., Asst. U. S. Attorney.

In the Northern Division of the United States District Court for the Northern District of California.

No. 4718.

INDICTMENT.

FIRST COUNT.

(Nuisance; 27 U. S. C., Sec. 33.)

In the April, 1930, term of said Division, the Grand Jurors thereof upon their oaths, present: THAT

JAMES DUNN

(hereinafter called "said accused"), on the 4th day of July, 1930, at a place known as No. 301–2d Street, in the City of Eureka, County of Humboldt, within said Division, did then and there knowingly and wilfully maintain a common nuisance, in then and there knowingly and wilfully committing a pro-

hibited and unlawful act of keeping for sale at said place certain intoxicating liquor fit for use for beverage purposes, to wit: five drinks of whiskey and one drink of beer containing more than one-half of one per cent alcohol by volume.

SECOND COUNT.

(Possession; 27 U. S. C., sec. 12.)

And the said Grand Jurors, upon their oaths, do further present: That the said accused then and there knowingly and wilfully committed a prohibited and unlawful act of possession of the said certain intoxicating liquor.

THIRD COUNT.

(Sale; 27 U. S. C. sec. 12.)

And the said Grand Jurors, upon their oaths, do further present: That the said accused, on the 26th day of June, 1930, at the said place, did then and there knowingly and wilfully commit a prohibited and unlawful act of sale of certain intoxicating liquor fit for beverage purposes, to wit: five drinks of whiskey and one drink of beer.

GEO. J. HATFIELD,
United States Attorney.
ALBERT E. SHEETS,
Asst. United States Attorney.

[Endorsed]: A true bill. R. B. Carlton, Foreman. Filed Jul. 16, 1930. Walter B. Maling, Clerk. By F. M. Lampert, Deputy Clerk. [1*]

*Page-number appearing at the foot of page of original certified Transcript of Record.

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Monday, the 21st day of July, in the year of our Lord one thousand nine hundred and 30. Present: the Honorable A. F. ST. SURE, District Judge.

No. 4718.

UNITED STATES

vs.

JAMES DUNN.

MINUTES OF COURT—JULY 21, 1930—ARRAIGNMENT AND PLEA.

The defendant being present with E. S. Selvage, Esq., his attorney, was duly arraigned, waived reading of the indictment, and thereupon plead Not Guilty. ORDERED this case set for July 22, 1930, for trial. [2]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Eureka, on Wednesday, the 23d day of July, in the year of our Lord one thousand nine hundred and 30. Present: the Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—JULY 23, 1930—TRIAL.

This case came on this day for trial. The defendant was present with C. A. Russell and E. S. Selvage, Esqrs., his attorneys. A. E. Sheets, Asst. U. S. Attorney, was present on behalf of the United States. Thereupon the following jurors, viz.:

1. Arthur E. Cartwright
2. L. L. Bryan
3. Daniel McClure
4. Robert Maclean
5. Neil McLeod
6. Nicolay C. Bonniksen
7. Harvey Littlefield
8. H. A. Graham
9. Joseph M. Walker
10. Hubert Alexander Baldwin
11. Henry F. Brizard
12. Emil H. Jensen

twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Mr. Sheets made a statement to the Court and jury in behalf of the United States. R. C. Osborne and C. Beam were sworn and testified on behalf of the United States and the United States rested. Mr. Russell made a motion to instruct the jury to return a verdict of Not Guilty, which said motion was ordered denied and defendant allowed an exception to the

ruling of the Court. Mr. Russell made a statement to the Court and jury on behalf of the defendant. James Dunn and Mrs. Florence Classen were sworn and testified on behalf of the defendant. ORDERED that the further trial hereof be continued until 10 A. M. to-morrow and the jury, after being admonished by the Court, were excused until that time. [3]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Thursday, the 24th day of July, in the year of our Lord one thousand nine hundred and 30. Present: the Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—JULY 24, 1930—TRIAL (RESUMED).

The defendant, the attorneys and the jury impaneled herein being present as heretofore the trial hereof was thereupon resumed. Mrs. Florence Classen was recalled and Joe Dunn, Clarence Cralle and Robert Shields were sworn and testified on behalf of the defendant. Defendant introduced in evidence and filed its exhibit marked "A." Edward C. Harkins was sworn and R. C. Osborne was recalled and testified on behalf of the United States in rebuttal and the evidence was closed. Mr. Russell made a motion to instruct the jury to

return a verdict of not guilty, which said motion was ordered and denied and the defendant allowed an exception to the ruling of the Court. After argument by the attorneys and the instruction of the Court to the jury, the jury at 2:18 P. M. retired to deliberate upon their verdict. At 4:35 P. M. the jury returned into court and being asked if they had agreed upon their verdict, replied in the affirmative and returned the following verdict, which was ordered recorded, viz.:

"We, the Jury, find James Dunn, the defendant at the bar, Guilty on First Count, Not Guilty on Second Count, Not Guilty on Third Count.

HENRY F. BRIZARD,
Foreman."

and the jury being asked if said verdict as recorded is their verdict, each juror replied that it is. ORDERED that the jury be discharged from further consideration thereof. ORDERED that this case be continued to July 25th, 1930, for judgment and that the defendant be remanded in the custody of the United States Marshal and that a mittimus issue herein. [4]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Friday, the 25th day of July, in the year of our Lord one thousand nine hundred and 30. Present: the Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—JULY 25, 1930—SENTENCE.

The defendant being present with E. S. Selvage, Esq., his attorney. A. E. Sheets, Asst. U. S. Attorney, was present for the United States. Defendant made a motion to set aside verdict; motion for a new trial and motion in arrest of judgment. After hearing had, IT IS ORDERED that said motions be denied. Defendant was thereupon called for judgment. ORDERED that the defendant be imprisoned for the period of One (1) Year in the County Jail, Contra Costa County, California, and that he pay a fine in the sum of Five Hundred ($500.00) Dollars. FURTHER ORDERED that in default of the payment of said fine that said defendant be further imprisoned until said fine be paid or until he be otherwise discharged by due course of law. [5]

[Title of Court and Cause.]

VERDICT.

We, the jury, find James Dunn, the defendant at the bar,

Guilty on First Count.
Not Guilty on Second Count.
Not Guilty on Third Count.

HENRY F. BRIZARD,
Foreman.

[Endorsed]: Filed July 24, 1930, at 4 o'clock and 35 minutes P. M. [6]

In the Northern Division of the United States District Court, for the Northern District of California.

No. 4718.

THE UNITED STATES OF AMERICA

vs.

JAMES DUNN.

JUDGMENT ON VERDICT OF GUILTY.

Convicted Viol. Jones-Stalker Act.

The Assistant United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the indictment filed on the 16th day of July, 1930, charging him with the crime of Viol. Jones-Stalker Act; of his arraignment and plea of Not Guilty; of his trial and the verdict of the jury on the 24th day of July, 1930, to wit:

"We, the Jury, find James Dunn, the defendant at the bar, Guilty on First Count, Not Guilty on Second Count, Not Guilty on Third Count.

HENRY F. BRIZARD,
Foreman."

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or ap-

pearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment;

THAT, WHEREAS, the said JAMES DUNN having been duly convicted in this court of the crime of viol. Jones-Stalker Act,—

IT IS THEREFORE ORDERED AND ADJUDGED that the said defendant be imprisoned for the period of One (1) Year in the County Jail, Contra Costa County, California, and that he pay a fine in the sum of Five Hundred ($500.00) Dollars; further ordered that in default of the payment of said fine that said defendant be further imprisoned until said fine be paid or until he be otherwise discharged by due course of law.

Judgment entered this 25th day of July, 1930.

WALTER B. MALING,
Clerk.

By F. M. Lampert,
Deputy Clerk. [7]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Now comes James Dunn, defendant in the above-entitled cause, and by Eugene S. Selvage, Esq., one of his attorneys, moves the Court to grant a new trial of said cause, and for reasons therefor, shows to the Court the following:

1. That the verdict in said cause is contrary to law.

2. That the verdict in said cause was not supported by the evidence in the case.

3. That the evidence in said cause is insufficient to justify said verdict.

4. That the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial, which errors were duly excepted to.

5. Newly discovered evidence, material to the defendant, which he could not, with reasonable diligence have discovered, and produced at the trial. That attached is an affidavit in support of this ground for a new trial.

Dated at Eureka, California, this 30th day of July, 1930.

JAMES DUNN,
Defendant.

EUGENE S. SELVAGE,
CLIFFORD RUSSELL,
Attorneys for Defendant. [8]

Service of the within motion for a new trial is hereby admitted this 4th day of Aug., 1930.

GEO. J. HATFIELD,
United States Attorney. [9]

[Title of Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL.

State of California,
County of Humboldt,—ss.

Joe Dunn, being first duly sworn, deposes and says:

That he is the brother of James Dunn, the defendant in the above-entitled action; that for approximately one year last past he has been and is now working for James Dunn, in his place of business at No. 301, Second Street, City of Eureka, California.

That your affiant goes to work at noon of each day and works until three o'clock P. M.; he then has time off and returns again to work at six o'clock P. M., and works until midnight of each day.

That James Dunn usually goes to work around eight o'clock A. M. and works until noon. He then remains off until three o'clock, at which time he returns to work and remains at the place from three o'clock to six o'clock P. M., during the time which affiant has off.

That Charles Granger does the janitor work in the place and he goes to work about six o'clock each morning and works until about eight o'clock A. M.; he then is off until about two o'clock, returns and works until three o'clock P. M.; that he does the cleaning up the janitor work about the place. [10]

That Walter Kuchan also works in the place; that he usually goes to work in the afternoon of each day and works until five o'clock P. M. He then takes one hour off for dinner, returning at six o'clock P. M., after which he works until midnight of each day.

That on the 26th day of June, 1930, Joe Dunn, Walter Kuchan and Charles Granger were the only persons working in the premises; that Charles Granger went to work about six o'clock A. M. and worked until noon; he then was off until three o'clock in the afternoon, at which time he returned and worked until five o'clock P. M., at which time he quit for the day.

That your affiant went to work on June 26th, 1930, about eight o'clock A. M., and worked until three o'clock P. M., at which time he left to eat and did not return until about five o'clock P. M., and that thereafter he worked until twelve o'clock midnight.

That Walter Kuchan on June 26th, 1930, was working during his regular working hours as aforesaid.

That your affiant is six feet tall, weighs one hundred and ninety-four pounds, has dark hair and eyebrows, has no teeth missing in the front of his mouth, has grey eyes, smooth shaven, age forty-seven years, white race.

That Charles Granger is five feet six inches tall, weighs one hundred and eighty-five pounds, has grey hair and eyebrows, has false teeth but no teeth missing, brown eyes, has grey mustache, age seventy-two years, white race.

That Walter Kuchan is five feet eight inches tall, weighs between one hundred and forty and one hundred and forty-five pounds, dark hair, no teeth missing, brown eyes, smooth shaven, age between forty and forty-five years, white race.

JOE DUNN.

Subscribed and sworn to before me this 31st day of July, 1930.

_____,

Notary Public in and for the County of Humboldt, State of California. [11]

[Endorsed]: Filed Aug. 4, 1930. [12]

[Title of Court and Cause.]

MOTION IN ARREST OF JUDGMENT.

Now comes the defendant James Dunn, and respectfully moves this Court to arrest and withhold judgment in the above-entitled cause and moves that the verdict of conviction of said defendant heretofore given and made in the said cause be vacated and set aside and declared to be null and void for each of the following reasons:

I.

That the verdict is contrary to law in that the evidence was confined solely to a sale at one time with no evidence of other violations or habitual sales, and likewise with no evidence from which such acts may reasonably be deducted. Therefore

the penalty provided in the Act for unlawful sale would alone apply.

That the section penalizing as a nuisance the maintaining of premises on which liquor is sold, implies a continuity of action and not a single sale.

II.

That the verdict convicting the defendant of maintaining a nuisance and acquitting him of possession and sale is inconsistent, cannot be reconciled and cannot stand for the following reasons, to wit: The testimony of the Government was to the effect that defendant made a sale of six drinks to two Government agents on June 26, 1930. Of this sale the jury found the defendant not guilty. There was no evidence of any other sale by [13] any other person whomsoever, and there was no evidence that any liquor other than the six drinks was ever sold or kept on said premises.

That by finding said defendant not guilty of said sale and not guilty of said possession the jury cannot as a matter of law find defendant guilty of nuisance.

III.

That Count No. One of the Indictment on file herein does not present, state or charge facts sufficient to constitute a public offense under the laws of the United States against this defendant.

WHEREFORE, by reason of the premises the defendant prays this Honorable Court that judgment be withheld and the conviction of the defendant be declared null and void.

Dated at Eureka, California, July 31st, 1930.

JAMES DUNN,
Defendant.

EUGENE S. SELVAGE,
CLIFFORD RUSSELL,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 4, 1930. [14]

(Title of Court and Cause.)

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 16th day of July, 1930, the grand jury of the Northern Division of the Northern District of California returned an indictment charging defendant with violations of the Jones-Stalker Act and did present in the First Count that James Dunn, said defendant, on the 4th day of July, 1930, at a place known as No. 301 Second Street, in the City of Eureka, County of Humboldt, within said Division, did then and there knowingly and wilfully maintain a common nuisance, in then and there knowingly and wilfully committing a prohibited and unlawful act of keeping for sale at said place certain intoxicating liquor fit for beverage purposes, to wit: five drinks of whiskey and one drink of beer containing more than one-half of one per cent alcohol by volume and by Second Count as contained in said indictment did further present that said defendant then and there knowingly and wilfully committed a pro-

hibited and unlawful act of possession of said certain intoxicating liquor and by Third Count presented that the defendant on the 26th day of June, 1930, at the said place, did then and there knowingly and wilfully commit a prohibited and unlawful act of sale of certain intoxicating liquor fit for beverage purposes, to wit, five drinks of whiskey and one drink of beer.

That on the 21st day of July, 1930, the said James Dunn appeared in court and upon being called to plead to said indictment, pleaded [15] Not Guilty as shown by the records herein.

That thereafter the cause came on regularly for trial on the 23d day of July, 1930, at the hour of 2 o'clock P. M. before the Honorable A. F. St. Sure, District Judge of said court, and a jury duly and regularly impaneled and sworn, the United States being represented by Albert E. Sheets, Esq., Assistant United States Attorney and the defendant being represented by Clifford A. Russell, Esq. and Eugene S. Selvage, Esq. The opening statement having been made by counsel for the Government, the following proceedings, and none other, were had, and the following evidence, both oral and documentary, and none other, was received, to wit:

GOVERNMENT'S CASE.

TESTIMONY OF R. C. OSBORNE, FOR THE GOVERNMENT.

Thereupon R. C. OSBORNE was called and sworn as a witness on behalf of the Government, and testified as follows:

(Testimony of R. C. Osborne.)

Direct Examination.

(By Mr. SHEETS.)

I am a Federal Prohibition Officer. About 7:30 o'clock P. M. on the 26th day of June, 1930, in company with Federal Prohibition Agent Beam and two unknown men I visited premises No. 301 Second Street in the City of Eureka, California. These premises consist of a room fronting on Second Street containing fishing-tackle, sporting goods, cigars and soft drinks for sale with a larger room to the rear containing pool-tables with a bar to the right. At this particular time I passed through the room containing the fishing-tackle in company with Agent Beam and two other men and saw the defendant standing in the rear room back of the bar. We walked in there and the man that was transient he said, "Hello Jim."

We ordered three whiskeys and one beer, which the defendant served to the four of us. [16]

Q. Have you any doubt about this being the man who served the drinks? A. No.

I am able to tell whiskey by the taste and know that the drink he served me was whiskey. I paid one dollar ($1.00) for the four drinks to the defendant. A few minutes later Agent Beam, for fifty cents ($.50) purchased two more drinks. He drank one of these drinks and one of the other men with us drank the other one. The sale of the six drinks was made by defendant to us within the space of a few minutes.

(Testimony of R. C. Osborne.)

I do not know whether the liquor was served from a bottle, pitcher or container.

Cross-examination.

(By Mr. RUSSELL.)

I have been a prohibition agent since March 11, 1930. From my notes, which I made shortly after I left the place, I observed that the man who sold us the six drinks was five feet nine inches in height, 185 pounds in weight, 50 years of age, with dark hair and eyes, of the white race, was smooth shaven, and had a missing tooth in his upper jaw near the front.

Q. Would you tell me what in your opinion is the weight of the defendant? Would you stand up, please, Mr. Dunn?

A. Well, he looks to me now as if he weighs more than 185 pounds.

Q. Would you say the defendant as he stands there weighs 210 pounds or more?

A. I was so told by him that he did.

Q. When did he tell you that? On July 4th.

Q. That is the day he was arrested? A. Yes.

Q. In other words, he was not arrested when you say he made these sales on June 26th? A. No.

Q. As to his height what would you estimate his height at present. [17]

A. I would estimate his height at 5–10.

Q. Would you say his height was more than 5–10½? A. I could not say.

(Testimony of R. C. Osborne.)

Mr. RUSSELL.—Q. What would you say is the color of this man's hair?

A. Dark, turning gray.

The COURT.—Would you speak up.

A. It is dark, turning gray.

Mr. RUSSELL.—Q. Would you call that more dark?

A. Yes.

Q. Now is there any tooth missing in his upper jaw? A. I cannot say.

Q. You saw him this morning, did you not, Mr. Osborne, in Mr. Hatfield's office? A. Yes.

Q. Was there any tooth missing?

A. There was no tooth missing, there is an open space.

Q. But there is no tooth missing? A. No.

The COURT.—You say there is no tooth missing but there is an open space?

A. Between his teeth.

Mr. RUSSELL.—Might we ask at this time that Mr. Osborn point out what he calls the open space in Mr. Dunn's upper jaw?

The COURT.—Yes.

Mr. RUSSELL.—Just expose your teeth, and just state what you see, Mr. Osborne.

A. There.

Mr. RUSSELL.—For the sake of the record you refer to a space which you say exists on the right side of the upper jaw there between two teeth?

A. Yes, sir.

(Testimony of R. C. Osborne.)

Mr. SHEETS.—Would the defendant just draw aside his lips so that that might be clear. [18]

Mr. RUSSELL.—Yes.

Q. But as the defendant is now and as he was this morning there was no tooth missing from his head that you noticed? A. Not to my knowledge. I observe there is a space between two of his teeth but he has no missing tooth. We were in the place about ten minutes. I never talked to defendant except to order a drink. Nothing else was said. The defendant never talked to me. So far as I can recollect I never saw the defendant before. Prior to going into these premises I had four drinks of whiskey, two drinks of rum and two drinks of wine, making eight drinks in all. I next saw the defendant on July 4, 1930, at which time he was arrested.

Q. Is it not true that on the 4th of July you went in there and Mr. Dunn's brother was in there and Mr. Dunn came in there later on? A. No.

Q. Mr. Dunn was in there when you went in on the 4th of July? A. Yes.

Q. You are sure of that? A. Yes.

Q. Didn't you when you went in on the 4th of July look at Mr. Dunn's brother's teeth to see if there was a missing tooth? A. In that place?

Q. Yes. A. No.

Q. You did not look at them? A. No.

Redirect Examination.

(By Mr. SHEETS.)

I have been in the Government Service for

(Testimony of R. C. Osborne.)

twenty-five years and in the Prohibition Service since March 11, 1930.

The following particular questions and answers were given:

Mr. SHEETS.—Q. With reference to those eight drinks that you had, do you adopt any method to prevent yourself from becoming intoxicated, from liquor which you have to consume in the course of your duty? [19]

Mr. RUSSELL.—Objected to as leading and suggestive.

The COURT.—Overruled.

Mr. RUSSELL.—Exception.

A. Yes, I do.

Mr. SHEETS.—Q. Did you in this instance?

A. Yes.

Q. What?

Mr. RUSSELL.—Same objection, if your Honor please.

The COURT.—Overruled.

Mr. RUSSELL.—Exception.

A. I put my finger down in my throat and bring it up.

Mr. SHEETS.—Q. Had you done that this evening?

A. Yes.

Q. When? A. I did it in Jim Dunn's place.

Q. Whereabouts? A. In the toilet.

Q. Were you sober?

A. I think I was, I don't know.

Q. Have you now any doubt about it?

(Testimony of R. C. Osborne.)

Mr. RUSSELL.—We object to that as cross-examination of his own witness.

The COURT.—Overruled.

Mr. RUSSELL.—Exception.

A. I don't think that I could be absolutely sober with those drinks of liquor.

Mr. SHEETS.—Q. Did you know what was going on?

A. Yes.

Q. You had full possession of your faculties?

A. Yes.

Mr. RUSSELL.—We again object to that as leading and suggestive.

The COURT.—Overruled.

Mr. RUSSELL.—Note an exception. [20]

TESTIMONY OF C. BEAM, FOR THE GOVERNMENT.

C. BEAM was called and sworn as a witness on behalf of the Government, and testified as follows:

Direct Examination.

(By Mr. SHEETS.)

I am a Federal Prohibition Officer. On the 26th day of June, 1930, in company with Prohibition Officer Osborne and two unknown men, I visited premises No. 301 Second Street in the City of Eureka. The premises looked to be a cigar-store in front with some fishing-tackle in the south window. Immediately behind there is a room with pool-tables and a bar. There is a partition divid-

(Testimony of C. Beam.)

ing the two rooms probably twelve feet from the sidewalk. When we walked in one of the pick-ups said, "Hello, Jim," and we immediately walked up to the bar, ordered four drinks, for which Agent Osborne paid defendant twenty-five cents a drink. I purchased two drinks of whiskey about five minutes after Agent Osborne bought his drinks for which I paid twenty-five cents a drink. I did not observe the defendant serve any other drinks to anyone. I did not notice what he did with the money as we immediately left the building.

Q. What did he serve the drinks in?

A. He served them in one ounce whiskey glasses.

Q. What did he serve them out of?

A. I could not tell; he got them underneath the bar some place.

Q. Was it amber colored liquor or white?

A. Amber colored.

Q. Was it jackass or bourbon?

A. Rotten jackass.

Q. You say rotten jackass?

A. Rotten is right.

Q. You then went away?

A. I never came back.

Q. I say you went away from there? A. Yes.

Q. You never went back?

A. I never went back. [21]

Cross-examination.

(By Mr. RUSSELL.)

Mr. RUSSELL.—Q. How many drinks did you have on that evening?

(Testimony of C. Beam.)

A. I had eight drinks.

Q. Did you have the same as Mr. Osborne, four drinks of jackass brandy, two of rum and two of wine? A. That is right.

Q. Before you went in the place?

A. That is right.

Q. That did not affect you in any way?

A. Well, I was not sober in a way.

Q. Now, when Mr. Dunn as you say took the money for the first drink from Mr. Osborne, where did he put it?

A. He rang it up on the cash register.

Q. What sort of a cash register?

A. I never paid any attention to what kind it was.

Q. Where was it located?

A. About the middle of the back of the bar.

Q. You said in answer to a question of Mr. Sheets' that you did not see Mr. Dunn serve any more drinks after the first drink that was brought by Mr. Osborne, and then later on you said he served two drinks to you. When you say you did not see him serve any more drinks, what did you mean? A. To anybody else.

Q. Excluding those that were served to you, is that it? A. Yes.

In my notes which I made shortly after I left the place I made the following description of the man who sold us the drinks, viz.: He was 50 years of age, white race, five feet nine inches in height, weighed about 185 pounds, dark hair and eyes,

(Testimony of C. Beam.)

medium build, upper tooth missing on the right side. I observed to-day that the defendant has no missing tooth. He has an open space between two of his teeth. [22]

Mr. RUSSELL.—Q. Although you observed him closely that evening?

A. Just only a glance.

Q. How long were you in there?

A. Five or ten minutes.

Q. During the entire five or ten minutes you just took one glance at him? A. One glance.

STIPULATION AS TO OWNERSHIP OF PREMISES.

It was stipulated by counsel for the respective parties that James Dunn is and on June 26th, 1930, was the owner of the premises designated as No. 301 Second Street in the city of Eureka, County of Humboldt, State of California.

The Government thereupon rested its case.

EXCEPTION No. 1.

Thereupon counsel for defendant moved for an instructed verdict on the ground that the evidence was insufficient to show that defendant on the 4th day of July, 1930, maintained a or any common nuisance as presented in the First Count of said Indictment. This motion was made on the further ground there was no evidence whatsoever that any liquor was kept for sale on said premises on the 4th day of July, 1930, as alleged in the Indictment.

The only evidence being that on the 26th day of June, 1930, a different date than set forth in the Indictment, the two agents purchased six drinks of liquor from the defendant.

The Court first denied the motion for the instructed verdict, and then advised that counsel may later renew the motion.

To which ruling of the Court the defendant then and there duly and regularly excepted, and still excepts and here designates as "Exception No. 1." [23]

DEFENDANT'S CASE.

TESTIMONY OF JAMES DUNN, FOR DEFENDANT.

Thereupon JAMES DUNN was called and sworn as a witness on his own behalf, and testified as follows:

Direct Examination.

(By Mr. RUSSELL.)

I am the defendant in this case. I own the premises known as 301 Second Street in the City of Eureka, California. On the 26th day of June, 1930, I was not in these premises until some time between 8 and 8:30 in the evening. During the day I was at my ranch at Blocksburg, Humboldt County, California. I was not in these premises at 7:30 o'clock on that evening and did not see either Mr. Osborne or Mr. Beam on that night or at any other time, so far as I know, until July 4th, 1930, at which time I saw Mr. Osborne. I did not sell Mr. Osborne, Mr.

(Testimony of James Dunn.)

Beam or the two men they mentioned the six drinks of liquor or any drinks of liquor whatsoever.

Cross-examination.

(By Mr. SHEETS.)

Q. Did you see Mr. Osborne before you were in your place of business?

A. Yes, I met him up the street.

Q. With whom was he? A. Marshal Burke.

Q. When you went to your place of business was Mr. Osborne in there? A. No.

Q. Did he come in there and find you in there?

A. Yes.

Mr. Osborne on July 4, 1930, at the time of my arrest looked in my mouth to see if I had a missing tooth.

On June 26th, 1930, I had been out to my place in the hills which is situated about seventy-six miles from Eureka and I did not return until about 8 o'clock in the evening. At that time I went to my place of business and shortly thereafter changed my clothes. [24] I saw my brother and the man who works in the place when I went in there. Mrs. Classen and her baby child were with me on the trip.

Mr. SHEETS.—Let me see if I understand you: Promptly on returning from your place in the hills you went to 301–2nd Street?

A. Yes.

Q. You did not go first and change your clothes?

A. No.

(Testimony of James Dunn.)

Q. Did anybody see you besides your brother at that time and Mrs. Classen?

A. I am quite sure they did.

Q. Do you recall anybody who did?

A. Yes, I do.

Q. Will you tell me the names now?

A. Yes, a man named R. T. Herron, I believe his name is; I can't recall any others; there were quite a few people in my place.

Q. Just prior to 8 o'clock were you in the presence of anyone except Mrs. Classen?

A. I cannot say that I was.

Q. You don't know the name of any other person who saw you preceding 8 o'clock, for how long?

A. I do not.

Q. For how long, or how many hours?

A. I was all day on this trip.

Q. You were all day in the presence of Mrs. Classen, and did any other person see you during that time? A. Yes, four people at my ranch.

Q. Who saw you?

A. Parker for one and Johnson another.

Q. When was the last hour before 8 o'clock he saw you?

A. It takes me four hours to drive in from there.

Q. Will you listen to the question: What was the last hour before 8 o'clock that Johnson saw you out on your ranch?

A. Four o'clock in the afternoon.

Q. And that was out at your ranch 76 miles away?

A. Yes, sir.

(Testimony of James Dunn.)

Q. Is that when you left your ranch? A. Yes.

Q. Johnson saw you then and who else saw you?

A. Parker [25]

Q. Who else? A. My boy.

Q. How old is he? A. He is 17 years of age.

Q. Anyone else? A. Another boy there.

Q. Who? A. His name is Nevers.

Q. How old is he?

A. He is about between 15 and 17.

Q. Is he living on your place?

A. He is on a vacation out there with my boy.

Q. Did Johnson work for you?

A. He is staying on the place out there doing odd chores.

Q. How long has he been there?

A. Since about last February.

Q. Who is the other man you named?

A. Parker.

Q. Does he work for you? A. Yes.

Q. How long has he worked for you?

A. Four years.

Q. Your boy and this other boy whose name is what— A. Fred Nevers.

Q. Does he live at your place? A. No.

Q. What was he doing out there?

A. He was on his vacation with my boy, a schoolboy; they were out there in the hills.

Q. Was there anybody else saw you?

A. Yes, I was over to the neighbors.

Q. At that same time? A. Yes.

Q. What neighbors?

(Testimony of James Dunn.)

A. His name, I believe, is Al Dane.

Q. You saw him about 3 or 3:30?

A. Some time during the day, I don't remember the time.

Q. Did you see him in the morning or afternoon?

A. I saw him in the afternoon.

Q. Shortly before you left or quite a while before you left? A. Shortly before I left.

Q. Who else of your neighbors? A. His wife.

Q. Who else? A. That is about all, I guess. [26]

Q. You have named now all the persons that you saw or who saw you before you left the ranch, is that right? A. Yes.

From the time I left the ranch until I reached Eureka at about 8 o'clock in the evening I was in the company of Mrs. Classen and her infant child.

Q. How old is the child?

A. Between 3 and 4 years old.

Q. Do you see Mr. Osborne standing over there by the door? A. Yes.

Q. That is the man who on July 4th came in your place after you had been placed under arrest and examined your mouth? A. Yes.

Q. You are positive of that? A. Yes.

Q. Do you see this gentleman standing here whose name is Harkins? A. Yes.

Q. As a matter of fact do you not know that Mr. Harkins was the man who on the night of July 4th examined your mouth?

A. He did when I first came in there. He did

(Testimony of James Dunn.)

when I first came in there, when I first gave myself up.

Q. Do you not know that as a matter of fact he is the man that examined your mouth?

A. No, I do not.

Q. Who was present at that time?

A. There was a man named Clarence Cralle, a man named Arthur Ferrera, my brother and this gentleman here and the other prohibition agents with him.

Q. This other prohibition agent?

A. No, Osborne was not there when I first went in my place.

Q. Who was present when Osborne was there?

A. This agent here and the man that was with him, and Mr. Burke and Mr. Osborne and the people in the house; they would not let anyone out.

Q. There were four Government officers there at the time Osborne examined your mouth? A. Yes.

Q. They were Mr. Burke and this gentleman, Mr. Harkins? A. Yes. [27]

Q. And Mr. Osborne and still another one whose name you don't know? A. Yes.

Q. You are positive that Mr. Osborne at that time was present and examined your mouth?

A. Yes.

Q. How long have you run that place?

Mr. RUSSELL.—That is objected to as immaterial and not proper cross-examination.

The COURT.—Overruled.

Mr. RUSSELL.—Note an exception.

(Testimony of James Dunn.)

A. It must be at least 10 years.

Mr. SHEETS.—Q. Do you have a cigar-store in the back? A. No.

Q. Do you have one in front? A. Yes.

Q. What do you have in back there?

A. Where do you mean, in back?

Q. In back of where this bar is.

A. In back of my cigar-store?

Q. Where the bar is?

A. I have two pool-tables there with four card-tables and soft drinks of all kinds.

Q. Do you sell ice-cream. A. No.

Q. Do you sell sandwiches? A. No.

Q. It is not possible to get lunch of any kind?

A. No.

Q. Do you have whiskey glasses in there?

A. Yes.

Q. What for? A. To serve bitters.

Q. You serve bitters? A. Yes.

Q. Is that all you serve in these whiskey glasses?

A. Yes.

Q. Who works for you at the bar?

Mr. RUSSELL.—Object to that as not proper cross-examination.

The COURT.—Overruled.

Mr. RUSSELL.—Note an exception.

A. My brother.

Mr. SHEETS.—Q. Is he the only man works behind your bar?

A. Yes. There is a man in the front, there are two men that I have there. [28]

(Testimony of James Dunn.)

Q. Is that a bar?

A. It is a counter, I guess. I don't know whether you call it counter or bar.

Q. Are drinks sold there? A. Yes.

Q. Drinks are also sold in front? A. Yes.

Q. Who serves drinks there?

A. Well, I have two different men there, one in the morning and one in the evening.

Q. What kind of drinks are sold out in the front?

A. I have milk-shakes, soda of all kinds, root beer, near-beer.

Q. But you keep this other bar for bitters and for other kinds of soft drinks and ice-cream?

A. To wait on my customers in back.

In the back room I have a counter or bar, two pool-tables, four card-tables and soft drinks of all kinds. I sell milk-shakes, soda and near-beer.

The counter or bar in the back is used to wait on my customers in the back.

Joe Dunn, my brother, works in the place. I also have two other men working there.

The Court then adjourned until Thursday, July 24, 1930, at 10 o'clock A. M.

On Thursday, July 24, 1930, at 10 o'clock, Mrs. FLORENCE CLASSEN was called as a witness on behalf of the defendant and testified as follows:

TESTIMONY OF MRS. FLORENCE CLASSEN, FOR DEFENDANT.

Direct Examination.

(By Mr. SELVAGE.)

I reside at 305 Second Street in the city of

(Testimony of Mrs. Florence Classen.)

Eureka, California. I know James Dunn and took a trip with him to his ranch on June 26, 1930. We started at 8 to 8:30 o'clock in the morning and traveled in his truck. It took us about four hours to go to his place. My baby of six years was with us. No one else. We remained at the [29] ranch a couple of hours and then returned to Eureka, arriving around 8 o'clock in the evening. After our arrival Mr. Dunn put the truck in the garage back of his place and then went into his premises and remained a few minutes. He then came out and we went to eat in the Splendid Cafe, where we remained until about 9 o'clock. I then returned to my home and put my child to bed. Mr. Dunn again went into his place of business and then came upstairs about a half hour later.

Cross-examination.

(By Mr. SHEETS.)

I am and since the year 1926 have been the housekeeper for James Dunn.

We left for his ranch between 8 and 8:30 o'clock in the morning. I know it was about that hour because Mr. Dunn went to the butcher-shop before leaving. This shop does not open until 8 o'clock in the morning. We arrived at the ranch about 12:30 P. M. We left the ranch to come home about 4 o'clock, arriving in Eureka around 8 o'clock. It takes about four hours to come in.

Mr. SHEETS.—Q. Now, that is nearly a month ago?

A. Yes.

(Testimony of Mrs. Florence Classen.)

Q. How do you fix the 26th of June as the day you went out to the ranch?

A. The evening of the 4th after Mr. Dunn had been arrested he came upstairs and he was talking about being arrested and I said, "That's too bad," and he said—

Q. (Interrupting.) Just a minute; how do you fix the time, yourself, independently, of the 26th, by your memory, not by what someone told you—how do you fix the time?

A. That is rather an embarrassing question to have to answer but if I have to I will.

Q. It is very important for me to know how you fix the date. Of course I do not wish to embarrass you but it is very important to know how any witnesses who testify positively as to a date fix the time when an alibi is the issue. [30]

A. Well, I will answer then. I was not feeling well on that date, and I am positive of that date.

Q. Did you see any people out there at the ranch?

A. I did.

Q. Who did you see?

A. Mr. Parker, Mr. Johnson and a neighbor.

Q. What was the neighbor's name?

A. Mr. Dane.

Q. Did you see Mrs. Dane?

A. No, I did not. Mr. Dane was over to the ranch and Mr. Dunn's son was there and a little boy by the name of Fred.

Q. Was Mrs. Dane over there?

A. No, she was not.

(Testimony of Mrs. Florence Classen.)

Q. Was Mr. Dunn at the ranch all that day?

A. Yes, he was at the ranch.

Q. He did not leave the ranch while you were there? A. No, he did not.

TESTIMONY OF JOE DUNN, FOR DEFENDANT.

Thereupon JOE DUNN was called and sworn as a witness on behalf of the defendant and testified as follows:

Direct Examination.

(By Mr. RUSSELL.)

I am a brother of James Dunn, the defendant. On the 26th day of June, 1930, I was employed at No. 301 Second Street, Eureka, California, and had been there employed for over a year. I generally worked each day from noon to 3 o'clock in the afternoon and from 6 in the evening to midnight. James Dunn, my brother, also worked from time to time in the premises. Generally he opened up about 8 o'clock in the morning and worked until I came at noon. He would later return and work from 3 to 6, the hours I had off. James Dunn never worked after 6 o'clock at night. [31]

On the 26th day of June, 1930, James Dunn was not working in the place. He was there a short time in the evening. I do not know the exact time but would judge it was between 7 and 8 o'clock. He did not work at any time behind the bar that evening. I was personally there from 6 o'clock

(Testimony of Joe Dunn.)

until midnight on June 26, 1930. I did not see either Mr. Beam or Mr. Osborne on that night and did not serve them any drinks whatsoever.

Thereupon a photograph of the front of the cigar and sporting goods store of James Dunn was identified by the witness and duly introduced in evidence as Defendant's Exhibit "A."

I was in the premises on the evening of July 4th at the time my brother was arrested. I saw Mr. Osborne there at that time. I do not believe Mr. Beam was there. One of the agents with a straw hat asked me if I had any tooth missing when he read the warrant to me. The warrant for John Doe was read by him to me first and I was first placed under arrest under this warrant.

Q. Now then, subsequently, did your brother come in, that is your brother came in?

A. Yes, he came in later.

Q. After he came in later, at any time when he was there, did any of the agents force him to open his mouth and show whether or not he had a missing tooth?

The COURT.—Force?

Mr. RUSSELL.—Compel him—I will put it, command him to open his mouth?

A. No, nobody commanded him.

The COURT.—Tell just what happened.

A. He came in while the agents were there and he said, "I guess I am the man you are looking for," and the agent said he would have to hold the both of us until the man came to identify us.

(Testimony of Joe Dunn.)

Mr. RUSSELL.—Q. Now then, did a man later on come in and identify either one of you? A. Yes.

Q. Was that Mr. Osborne? A. Yes. [32]

Q. What happened when Mr. Osborne came in?

A. He came in and Jim said, "I guess this warrant is for me, but I have no teeth missing."

Q. What else happened?

A. Then he came over and looked at me and then went back to Jim and said, "This is the man."

Cross-examination.

(By Mr. SHEETS.)

It was some time between 6 and 7 o'clock on July 4th when these officers made the arrest. It might have been, however, a little later.

My brother was in the premises on June 26, 1930, after he came in from the ranch. I would judge he was there some time between 7 and 8 o'clock. I was in charge of the place at that time.

When he comes in from the ranch my brother sometimes brings with him turkeys, chickens and berries. When he arrives with the truck he generally blows the horn and I go out and open the gate for him. When I am out of the place the man in the front of the cigar-store takes charge. I remember that he went to the country on June 26th because that is pay-day. When he is here he generally cashes the checks for the different fellows who come in from the lumber companies. He cashes at that time a number of checks.

When we read the warrant of arrest we observed that it referred to June 26th.

(Testimony of Joe Dunn.)

Q. How does that help you to refresh your memory, what connection has it, the fact that you cashed these checks on that night?

A. Otherwise I do not cash them. If he is there he cashes the checks.

Q. But he was not there during any evening in June, you said?

A. He is there every evening, but not working.

Q. If he is in town he is around there every evening? [33]

A. Yes, he is in and out.

Q. But when he is out during the evening, when he is in and out, that is part of the time, you cash the checks. Do you hear what I asked you?

A. Yes.

Q. When he is out during any evening in June you cash checks, don't you?

A. Well, yes. If he is in town he generally cashed them, probably 10 or 15 or 20 checks are cashed on pay-day.

Q. But he was there during part of the evening, wasn't he?

A. He came in from the ranch, yes, he came in and looked at the mail.

Q. He was there again, too, wasn't he?

A. Yes.

Q. Later on that evening?

A. After he had had his supper.

Q. Did he cash some checks? A. No, sir.

Q. He never cashed any checks that evening?

A. I don't think he did.

(Testimony of Joe Dunn.)

Q. How do you recall that it was that evening when the checks came in?

A. Well, I remember of cashing checks and it must have been or he would have done it.

Q. But here you are on the 24th of July and you are looking back to the 26th of June and you are testifying about where he was and place him. How does the fact that you cashed checks help you to remember, and how would you remember you cashed checks?

A. Naturally if you are busy cashing checks and serving people at the same time you notice that.

Q. On the 4th of July, looking back 10 days before that, does that help you to remember that?

A. You naturally look back if you are arrested or something like that.

Q. Wouldn't you be busy most any evening? [34]

A. Well, not like pay-day; you are not so busy; more money changes hands on pay-day.

Q. It is pay-day for who?

A. For the men that work at the camps and mills.

The COURT.—How many checks did you cash on that day?

A. I should say in the neighborhood of 12 or 15 or 18, probably 20 checks.

Mr. SHEETS.—Q. Mr. Dunn, look at Mr. Harkins and see if you remember seeing him before?

A. Yes, I saw him on the evening of the 4th of July.

Q. In 301—2nd Street.

(Testimony of Joe Dunn.)

Q. In that place of business? A. Yes.

Q. Did he look at you?

A. No, he stood over by the door keeping people from going out.

Q. Did he look at your brother when he came in?

A. Well, he spoke to him, yes.

Q. Did he look at his mouth?

A. No, I don't think he did.

Q. Do you remember seeing him there?

A. Oh, yes.

Q. And you remember distinctly that Mr. Osborne, who just went out of the courtroom as you started to testify, was the man who was in the place and actually looked at your and your brother's mouth? A. Yes.

Q. Are you sure of that? A. Yes.

TESTIMONY OF CLARENCE CRALLE, FOR DEFENDANT.

Thereupon CLARENCE CRALLE, was called and sworn as a witness on behalf of the defendant and testified as follows:

Direct Examination.

(By Mr. RUSSELL.)

I live in Eureka and am a barber by trade. On the evening of [35] July 4, 1930, I was in premises No. 301 Second Street. At that time I observed some prohibition agents came into the place. James Dunn was not there at that time but Joe Dunn was. The Government agent served the

(Testimony of Clarence Cralle.)

warrant on Joe Dunn the first thing and then read it to him. Later the agents asked me to open my mouth.

Cross-examination.

(By Mr. SHEETS.)

I have not seen the man around here that served the warrant; he had a white hat on, a panama hat, and this gentleman, referring to Mr. Harkins, was with him. One of the men asked me if I was a brother of James Dunn and he said, "Let me see your teeth," as I was going out, and James Dunn said, "No, he is not a brother of mine."

TESTIMONY OF ROBERT L. SHIELDS, FOR DEFENDANT.

Thereupon ROBERT L. SHIELDS was called and sworn as a witness on behalf of defendant and testified as follows:

Direct Examination.

(By Mr. RUSSELL.)

I am a contractor by occupation. I know James Dunn and his brother Joe Dunn. I was in James Dunn's place of business on the evening of July 4, 1930. I saw Mr. Osborne in that place of business on that evening. When he came in Mr. James Dunn was sitting on the corner of a pool-table. Joe Dunn was standing by the side of this pool-table. Mr. Osborne came in and passed in front of James Dunn and looked at Joe Dunn and then turned around

(Testimony of Robert L. Shields.)

and said, "We will take him," referring to James Dunn.

Cross-examination.

(By Mr. SHEETS.)

I have never been in a place that was raided prior to that occasion. I walked in just after the excitement was over. At the door there was a heavy-set fellow who is the marshal and there was [36] another fellow talking to Mr. Dunn when I walked in. Mr. Osborne was the man that walked over and said, "We will take Jim Dunn." The man on the other side, who was talking to Mr. Dunn and the marshal when I went in, he was the fellow that told me the short fellow was the marshal.

Mr. RUSSELL.—This little short fellow, Mr. Burke, is the one that you refer to as the marshal?

A. No, that does not look like the man that was with him when I went in. There was a fellow with him, a smaller fellow than this fellow here.

Mr. RUSSELL.—That is all.

Thereupon defendant rested.

REBUTTAL BY THE GOVERNMENT.

TESTIMONY OF EDWARD C. HARKINS, FOR THE GOVERNMENT (IN REBUTTAL).

Thereupon EDWARD C. HARKINS was called and sworn as a witness on behalf of the Government, and testified in rebuttal as follows:

(By Mr. SHEETS.)

I am a federal officer. I visited No. 301 Second

(Testimony of Edward C. Harkins.)

Street on July 4, 1930. I went there with Agent Maguier. We entered the premises about 6:15 o'clock P. M. on that day. Mr. Osborne came in before we left. He did not at that time in my presence examine the mouth of James Dunn or his brother.

Q. You saw what took place?

A. Agent Maguier and I went to the premises. Agent Maguier questioned the man behind the bar who was the brother of Mr. Jim Dunn. This man said that his name was Dunn but he was not Jim Dunn. Jim Dunn was mentioned on the warrant and Agent Maguier at that time asked him to show his teeth, which he did, and I had taken his place by the door to keep the people in the place on account of other raids in town and he came back to me and he said, "That is the brother of the man we want, he has no teeth missing." A short time after that, probably 10 or 15 minutes later, Mr. Jim Dunn came in and said, "I guess I am [37] the man you want." So Agent Maguier asked him to show his teeth; he and I were present, and he had a place between his teeth on one side that appeared as if a tooth were missing, and I said, "Well, I guess you are the man we want." A few minutes later Mr. Burke and Mr. Osborne came in and Mr. Osborne identified Mr. Dunn as the man we wanted, Mr. Jim Dunn.

Cross-examination.

(By Mr. RUSSELL.)

Before Mr. Osborne identified James Dunn he looked at both Joe Dunn and James Dunn.

(Testimony of Edward C. Harkins.)

Mr. RUSSELL.—Q. When you say that Mr. Dunn had a hole in his teeth, how did you observe that? Did you force him to open his mouth?

A. I requested him to open his mouth.

Q. You could not see it without him raising his lips, could you? A. No.

Redirect Examination.

(By Mr. SHEETS.)

When James Dunn opened his mouth and showed his teeth I saw a space between his teeth from which it appeared the tooth was missing. He did not have to lift his lips; he just showed his teeth.

Recross-examination.

(By Mr. RUSSELL.)

I could not say whether there was a missing tooth in Jim Dunn's mouth. There was a space between the teeth. I don't know that there is any missing tooth. I would not say that there is a missing tooth. There is a space between the teeth that might be a missing tooth. Jim Dunn fitted the description on the warrant that was given me. On the night of July 4th I would estimate that the weight of Jim Dunn to be in the neighborhood of 200 pounds. The warrant called for a man weighing 185 pounds. I do not recall now [38] what his height was, but if I could stand alongside of him I could estimate it. I would say his height was about 5 feet 10. I do not recall that the warrant called for a man 5 feet 9. I would say that his hair was dark with gray on the temples. I would say

(Testimony of Edward C. Harkins.)

his eyes are brown; they could easily be called black eyes or dark eyes. I don't recall that the warrant called for a man with dark eyes. I don't recall that the warrant called for a man with black hair.

Q. But you say in your opinion that Mr. Jim Dunn fits the description?

A. At the time I read the description.

Q. Why was it that you and Mr. Maguier waited for Mr. Osborne to come in before you were satisfied to take Dunn? A. Because it was our orders to.

Q. Your orders? A. Yes.

Q. In other words, didn't you say we will wait until the undercover man comes in to make sure?

A. I don't recall those words.

Q. But you did wait until Osborne came in before you took Dunn?

A. Yes, certainly, we were instructed so to do.

Q. Didn't you ask Mr. Cralle to open him mouth?

A. Mr. Cralle?

Q. Yes, the little fellow that came in here.

A. I did not get a very good look at him.

Q. A little short man. A. I don't think so.

Q. This gentleman, Mr. Cralle, didn't you ask him to open his mouth? A. No, I did not.

Q. Did Mr. Maguier ask him in your presence?

A. Not to my knowledge.

Mr. RUSSELL.—That is all. [39]

TESTIMONY OF R. C. OSBORNE, FOR THE GOVERNMENT (IN REBUTTAL).

Thereupon R. C. OSBORNE was called and sworn as a witness on behalf of the Government and testified in rebuttal as follows:

Direct Examination.

(By Mr. SHEETS.)

I went to the premises, 301 Second Street, on July 4, 1930, with Deputy Marshal Burke. At that time I pointed out the defendant as the man who sold me the liquor. Agent Beam was not there at that time.

Cross-examination.

(By Mr. RUSSELL.)

When I went in there I did not look at Joe Dunn first and then at James Dunn.

Thereupon both sides rested.

EXCEPTION. No. 2.

Thereupon Mr. RUSSELL.—We have no surrebuttal but we again desire to move the Court for an instructed verdict, and if I may call your Honor's attention to the Indictment to Count 1, the nuisance, and to Count 2, the possession count. Those are directed, your Honor, to the night of the 4th of July. The charge is maintaining a nuisance and possession of liquor. We submit that there is no evidence of any sort to show that on the 4th of July there was any violation of the law; the viola-

tion if any, occurred on the 26th of June; and the result would be that the nuisance ceased at that time. There is no presumption that could arise against the defendant.

The COURT.—Is there evidence that liquor was bought there on the 4th of July?

Mr. SHEETS.—On the 26th of June, and the 4th of July being a [40] date, the Government would not be concluded in its proof to any date within one year preceding the date in the first count and three years preceding the date in the third count.

Mr. RUSSELL.—I do not think that would apply where it is a nuisance occurring on the 4th of July.

The COURT.—The motion is denied.

Mr. RUSSELL.—Note an exception.

Thereupon ALBERT E. SHEETS, Esq., counsel for the Government made his argument to the jury with replies made by Clifford A. Russell, Esq., and Eugene S. Selvage, Esq., as attorneys for the defendant, with closing argument being made by Mr. Sheets.

EXCEPTION No. 3.

During the course of the closing argument Mr. Sheets made the following statement to the jury:

"Now, the alibi is proved by one of the most contemptible methods that I have ever observed in a court. The defendant himself says 'I went to the ranch that day; I arrived there somewhere around noon. I left there some time between 3 and 4, and I arrived home somewhere between 7:30 and 8.'

He is not definite as to any of these times. He said he was seen by his own boy, his boy's friend, his two ranch-hands, two neighbors. Any one of those would have established the fact that he was out there."

To which statement counsel for the defendant duly and regularly excepted and assigned the same as misconduct on the part of the United States Attorney on the ground that it is not incumbent on the defendant to produce any witness, that the witnesses were available to the United States Attorney's office if they desired to call them.

The Court was thereupon requested by defendant to instruct the jury to disregard the statement and the Court thereupon requested the jurors to "eliminate those remarks." That defendant here designates this exception as his "Exception No. 3." [41]

Thereupon counsel for the Government proceeded with his argument.

EXCEPTION No. 4.

Upon the conclusion of the argument of Mr. Sheets and on behalf of the defendant, Mr. Russell stated to the Court:

"I did not desire to interrupt Mr. Sheets but in line with his previous argument he said that the defendant or they have not produced a man with a missing tooth; we assign that as misconduct and ask your Honor to instruct the jury that we do not have to bring in anybody."

Thereupon the Court stated:

"The statement of Mr. Russell is correct. It is not incumbent upon the defendant to prove his innocence. It is incumbent upon the Government to prove the defendant *b*uilty beyond and to the exclusion of all reasonable doubt; so you will disregard the remarks that were made by the District Attorney with reference to the inability or failure of the defendant to produce a witness here with a missing tooth or to produce any other witness here.

The defendant at the time duly and regularly excepted and still excepts to said statements so made by the United States Attorney and assigned and still assigns the same as misconduct and which defendant here designates as his "Exception No. 4."

Thereupon the Court gave the jury the following instructions:

CHARGE TO THE JURY.

The COURT. — (Orally.) Gentlemen of the Jury, the grand jury of this District has presented an indictment against James Dunn charging him with violating certain provisions of the Prohibition Law of the Government. The indictment charges, among other things, that on the 4th day of July, 1930, at a place known as No. 301–2d Street in the city of Eureka, said defendant did then and there knowingly and wilfully maintain a common nuisance in then and there knowingly and wilfully [42] committing a prohibited and unlawful act of keeping for sale at said place certain intoxicating liquor fit for use for beverage purposes, to wit:

five drinks of whisky and one drink of beer containing more than one-half of one per cent of alcohol by volume; the second count of the indictment charges the defendant with having unlawfully possessed the liquor I have mentioned; the third count charges the defendant with having on the 26th day of June, 1930, at the place I have mentioned, No. 301–2d Street, Eureka, then and there, knowingly and wilfully committed a prohibitted and unlawful act of sale of certain intoxicating liquor fit for beverage purposes, to wit: five drinks of whisky and one drink of beer.

The element of nuisance is the keeping of intoxicating liquor for sale. If you find from the evidence that the defendant had in his possession any liquor containing more than one-half of one per cent of alcohol by volume for the purpose of such sale, then you must find the defendant guilty. If you find that the defendant was illegally in possession of liquor then such illegal possession constitutes *prima facie* evidence that it was so kept for sale, and as to such defendant so possessing such liquor the burden of proof is upon him to establish that such liquor was legally acquired, possessed and used, and such possession unexplained by the defendant plus the statutory presumption is sufficient to establish the maintenance of a common nuisance.

The charge as to possession needs no explanation. If you find from the evidence that the defendant unlawfully possessed intoxicating liquor, of course it will be your duty to find him guilty of that

charge; and the same with the charge as to sale, the charge as to sale being as I have heretofore stated that on or about the 26th day of June, 1930, at the place of business of this defendant he did then and there unlawfully sell such intoxicating liquor. [43]

Of course, if after a consideration of all of the evidence in the case you believe that he is guilty beyond and to the exclusion of all reasonable doubt of having sold liquor at his said place of business, it will be your duty to find him guilty of that charge.

Gentlemen, you are to understand at the very outset that the indictment against the defendant is a mere charge or accusation against him. It is no evidence whatsoever of his guilt nor are you permitted to indulge in any presumption of any kind against him because this charge has been placed against him by the Government.

The defendant enters upon the trial of this case with the presumption of innocence, and that presumption remains with him throughout the trial and until it is overcome by evidence. The defendant is not required to prove his innocence, but the Government is required by law to prove that he is guilty beyond and to the exclusion of all reasonable doubt. Upon the Government rests the burden of proving every material allegation in the indictment. You are the exclusive judges of the credibility of the witnesses and the weight of the evidence. You may judge of the credibility of a witness by his appearance upon the stand, by his manner of testifying, whether he has contradicted himself or whether he has been contradicted by other witnesses, whether he has

shown any bias, whether he has an interest in the outcome of the case, and by all those things you may judge his credibility.

The defendant here has seen fit to take the stand and testify in his own behalf. That was his right, and you are to weigh his testimony in the same scales that you weigh the testimony of other witnesses. You are to apply to his testimony the same test that you apply to the testimony of other witnesses, save and except in his case you may take into account the fact that he is the defendant [44] in the case and as such has a personal interest in the outcome of the case.

Where the evidence is susceptible of two interpretations, one of guilt and one of innocence, it will be your duty to favor the interpretation of innocence.

If you find from the evidence that the defendant was in possession of the liquor mentioned in the indictment, then as to such defendant this constitutes a *prima facie* showing that it was possessed illegally and the burden is then upon him to show that it was legally possessed.

The Government has introduced in this case the evidence of prohibition agents who have testified that on the 26th day of June they purchased liquor at the defendant's place in this city, but the Government has not introduced any actual intoxicating liquor which it claims to have been sold by the defendant. It has introduced proof that this defendant took part in and actually sold the prohibition officers intoxicating liquor which they con-

sumed in this place. This evidence, if believed by you, is sufficient to establish that fact.

EXCEPTION No. 5.

Thereupon the Court gave the jury the following instruction:

"It is difficult and frequently impossible for those whose business it is to enforce the prohibition law to secure by purchase and take away with them a bottle containing the actual liquor involved in the transaction, and the presence in court of the actual intoxicating liquor which may have been purchased is not required. This evidence may be supplied by testimony of witnesses that they purchase intoxicating liquor and that from their knowledge and experience such liquor was in fact intoxicating."

EXCEPTION No. 6.

Thereupon the Court gave the jury the following instruction: [45]

"The familiar rule of the civil law that a person is held to be responsible for the act of an agent employed by him when the act is done in the course of the agency and in furtherance of it is equally applicable in the criminal law. When an indictment charges a defendant with crime it is not necessary for the Government to prove that the act was committed by the defendant personally, but it is sufficient for the Government to prove that the act was committed by an agent of the defendant and committed in the course of the agency and in furtherance of it. It matters not whether his agent was an innocent agent or a guilty agent, a conscious

or an unconscious instrumentality of the crime; the agent's principal would be criminally liable in either case.

I instruct you, Gentlemen, that it is the law that 'Whoever directly commits any act constituting an offense defined in any law of the United States or aids or abets or procures its commission is a principal.' Aid means to help, support, assist, one who helps or promotes in doing something. Abet means to instigate or encourage by aid or countenance; to contribute as an assistant or instigator in he commission of an offense. The owner of an establishment or business who has knowledge that an employee is maintaining a liquor nuisance therein is an aider and abetor and may be convicted as a principal.

The defendant has introduced evidence tending to show that he was not present at the time and place of the commission of the crime charged in this indictment. It is your duty in considering this evidence to take into consideration all of the facts in this case and to scrutinize carefully the evidence in reference to the alibi. If the evidence of an alibi in connection with all the other evidence raises a reasonable doubt of the presence of the defendant at the time and place of the crime he should be acquitted. [46]

I have said to you, Gentlemen, at the very outset of my instructions that you cannot convict this defendant unless you believe that he is guilty beyond and to the exclusion of all reasonable doubt. Now reasonable doubt means exactly what the words

"reasonable doubt" import. It means a doubt based upon reason. It does not mean a doubt based upon suspicion or whim or fancy that may be in the juror's mind, but it is a doubt that must be based upon reason. A reasonable doubt has been defined to be that state of the case when after a consideration and comparison of all of the evidence in the case a juror finds his state of mind to be that he cannot say that he feels an abiding conviction to a moral certainty of the truth of the charge. Your verdict must be unanimous.

Any exceptions?

Mr. RUSSELL.—If your Honor please, the defendant desires to except to that portion of the instructions—I think they were written and submitted to your Honor—your Honor may help me with the exact wording—that it is difficult for those charged with the enforcement of prohibition laws to take away a bottle of evidence, of liquor; we feel that that is not a proper instruction and except to that.

We also feel that the instructions given by your Honor with reference to agency is not proper in this case because it would tend to convince the minds of the jury, and for that reason we note an exception to that. The evidence as we understand it is a direct statement that Mr. Dunn himself sold the liquor. There is no evidence in the case of any agent selling it.

The COURT.—As to whether or not the defendant here was maintaining a nuisance, I take it that it is the law that if he owns these premises and he

knows someone was selling liquor there he would be responsible for the act of that agent, whoever that would be. [47]

Mr. RUSSELL.—We would concede that, but the evidence, and the only evidence is that the sale, if any, was made by Mr. Dunn. There is not any question of agency.

The COURT.—I understand your contention. The jury may now retire.

Thereupon the jury retired to consider their verdict, and thereafter returned to the court with a verdict of guilty on Count One charging nuisance and a verdict of not guilty on Count Two charging possession and a verdict of not guilty on Count Three charging sale.

EXCEPTION No. 7.

Thereupon the Court arraigned the defendant for judgment and the pronouncement of sentence. The defendant was asked to show cause, if any he had, why sentence should not be pronounced upon him, according to law. Upon motion of counsel for defendant the time for pronouncement of sentence was continued to July 25, 1930, at 10 o'clock A. M. At that time and within the time prescribed by law, and before the judgment of the Court was entered upon the verdict, the defendant duly and regularly made his motion for a new trial in said cause, which was by the Court denied.

To which ruling of the Court, denying said motion for a new trial, the defendant then and there duly and regularly excepted, and still excepts, here designates as his "Exception No. 7."

EXCEPTION No. 8.

Thereupon, and within the time prescribed by law, and before the judgment of the Court was entered upon the verdict, the defendant made a motion in arrest of judgment, which motion was ordered by the Court denied.

To which ruling of the Court, denying said motion in arrest of judgment, the defendant then and there duly and regularly excepted, and still excepts and here designates as his "Exception No. 8." [48]

Whereupon the Court rendered its judgment directing that James Dunn, said defendant, be imprisoned for the period of one year and pay a fine in the sum of Five Hundred Dollars ($500.00.)

That defendant's proposed bill of exceptions was lodged on the 4th day of August, 1930.

That said defendant hereby presents the foregoing as his bill of exceptions herein and asks that the same be allowed, signed and sealed and made a part of the record in this case.

Dated, September 23, 1930.

EUGENE S. SELVAGE,
CLIFFORD A. RUSSELL,
Attorneys for Defendant. [49]

[Title of Court and Cause.]

STIPULATION RE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the foregoing bill of exceptions is

correct and that the same may be signed, settled, allowed and sealed by the Court.

Dated, September 23d, 1930.

GEO. J. HATFIELD,
A. E. L.,
United States Attorney.
EUGENE S. SELVAGE,
CLIFFORD A. RUSSELL,
Attorneys for Defendant. [50]

[Title of Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS.

This bill of exceptions having been duly presented to the court within the time allowed by law and the rules of the court, is now signed, sealed and made a part of the records in this case, and is allowed as correct.

Dated, September 23, 1930.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Sep. 25, 1930. [51]

[Title of Court and Cause.]

PETITION FOR APPEAL AND SUPERSEDEAS.

To the Honorable A. F. ST. SURE, District Judge:

The above-named defendant feeling himself aggrieved by the verdict of the jury rendered on the

24th day of July, 1930, and the judgment and sentence entered thereon in this cause on the 25th day of July, 1930, does hereby appeal from said judgment and sentence to the Circuit Court of Appeals for the Ninth Circuit for the reason specified in the assignment of errors which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and sentence were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made, and that this defendant be awarded a supersedeas upon said judgment and all necessary and proper process including bail pending his appeal.

Dated: Eureka, California, this 30th day of July, 1930.

JAMES DUNN,
Defendant.

EUGENE S. SELVAGE,
CLIFFORD RUSSELL,
Attorneys for Defendant. [52].

Service of the within petition is hereby admitted this 4th day of August, 1930.

GEO. J. HATFIELD,
United States Attorney.

Service of the within petition for appeal, etc., by copy admitted this 4th day of Aug., 1930.

GEO. J. HATFIELD,
Attorney for Pltf.

[Endorsed]: Filed Aug. 4, 1930. [53]

[Title of Court and Cause.]

ORDER ALLOWING PETITION FOR APPEAL AND SUPERSEDEAS.

The petition for appeal and supersedeas herein prayed for by James Dunn, defendant and appellant, pending the decision upon said petition for appeal, is hereby allowed and the defendant is admitted to bail upon the petition for appeal in the sum of Five Thousand Dollars.

The bond for costs on the petition for appeal is hereby fixed at Two Hundred Fifty Dollars.

Dated: Eureka, California, this 4th day of August, 1930.

A. F. ST. SURE,
United States District Judge.

Service of the above order allowing appeal and supersedeas is hereby admitted this 4th day of August, 1930.

GEO. J. HATFIELD,
United States Attorney.

[Endorsed]: Filed Aug. 5, 1930. [54]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

James Dunn, defendant in the above-entitled cause and plaintiff in error herein, having petitioned for a writ of error in this cause directed to this Court from the United States Circuit Court of Appeals for the Ninth Circuit, now makes and files with his petition the following assignment of errors, upon which he will apply for a reversal of the judgment and sentence of the Court, as entered herein; which said errors and each of them are to the great detriment, injury and prejudice of the said defendant, and are in violation of the rights conferred upon him by law; to wit:

I.

The Court erred in denying defendant's motion for a directed verdict in his favor which was made at the close of the Government's case on the ground that the evidence was insufficient to show that defendant on the fourth day of July, 1930, maintained a or any common nuisance as presented in the first count of said Indictment, and on the further ground that there was no evidence whatsoever that any liquor was kept for sale on said premises on the fourth day of July, 1930, as alleged in the Indictment. The only evidence being that on the 26th day of June, 1930, a different date than set forth in the Indictment, the two Government [55] agents purchased six drinks of liquor from the defendant, all as set out in Defendant's Exception No.

1, appearing on pages 6 and 7 of the bill of exceptions.

Which said ruling has been heretofore designated as Defendant's Exception No. 1.

II.

The Court erred in denying defendant's motion for a directed verdict in his favor, which was made at the close of the case on the ground that the evidence was insufficient to show that defendant on the fourth day of July, 1930, maintained a or any common nuisance as presented in the first count of said Indictment, and on the further ground that there was no evidence that any liquor was kept for sale or possessed on said premises on the fourth day of July, 1930, as alleged in the Indictment, the only evidence being that on the 26th day of June, 1930, a different date than set forth in the Indictment, the two agents purchased six drinks of liquor from the defendant, and upon the further ground that no presumption could arise against the defendant for maintaining a nuisance on July 4th, 1930, when the only testimony related to a sale purported to have taken place on June 26th, 1930, all as set out in Defendant's Exception No. 2, appearing on page 18 of the bill of exceptions.

Which said ruling has been heretofore designated as Defendant's Exception No. 2.

III.

The Assistant United States Attorney erred during the course of his closing argument to the jury when he made the following statement, to wit:

> "Now, the alibi is proved by one of the most contemptible methods that I have ever observed in a court. The defendant himself says, 'I went to the ranch that day; I arrived there some time between 3 and 4, and I arrived home somewhere between 7:30 and 8.' He is not definite as to any of these times. He said he was [56] 'seen by his own boy, his boy's friend, his two ranch-hands, two neighbors. Any one of those would have established the fact that he was out there,"

on the ground that it is not incumbent upon the defendant to produce any witness upon the trial, all as set forth in Exception No. 3, appearing on pages 18 and 19 of the bill of exceptions.

Which statement has been heretofore assigned as Defendant's Exception No. 3.

IV.

The Assistant United States Attorney erred during the course of his closing argument to the jury when he stated in substance, "'that the defendant or they have not produced a man with a missing tooth,'" on the ground that there is no duty resting upon the defendant to produce any witnesses, and that it is improper for the District Attorney to make reference to the inability or failure of the defendant to produce a witness with a missing tooth or to produce any other witness, all as set forth in Exception No. 4, appearing on pages 19 and 20 of the bill of exceptions.

Which said statement has been heretofore designated as Defendant's Exception No. 4.

V.

The Court erred in giving to the jury the following instruction, to wit:

> "It is difficult, and frequently impossible for those whose business it is to enforce the prohibition law to secure by purchase and take away with them a bottle containing the actual liquor involved in the transaction, and the presence in court of the actual intoxicating liquor which may have been purchased is not required. This evidence may be supplied by testimony of witnesses that they purchased intoxicating liquor and that from their knowledge and experience such liquor was in fact intoxicating." [57]

on the ground that it is improper for the Court to instruct the jury in generalities with regard to the difficult and frequent impossibility of securing actual liquor which may be presented upon a trial, and implying that sufficient evidence in this case may be supplied by testimony of Government witnesses that purchased liquor without further instructing the jury that the same weight and no more, and the same rules of evidence should apply to their testimony as to any other witness in the case, all as contained in Exception No. 5, appearing on page 24, in the bill of exceptions.

Which said instruction has been heretofore designated as Defendant's Exception No. 5.

VI.

The Court erred in giving the jury the following instruction:

"The familiar rule of the civil law that a person is held to be responsible for the act of an agent employed by him when the act is done in the course of the agency had and in furtherance of it is equally applicable in the criminal law. When an indictment charges a defendant with crime it is not necessary for the Government to prove that the act was committed by the defendant personally, but it is sufficient for the Government to prove that the act was committed by an agent of the defendant, and committed in the course of the agency and in furtherance of it. It matters not whether his agent was an innocent agent or a guilty agent, a conscious or an unconscious instrumentality of the crime; the agent's principal would be criminally liable in either case.

I instruct you, Gentlemen, that it is the law that 'Whoever directly commits any act constituting an offense defined in commission is a principal.' Aid means to help, support, assist, one who helps or promotes in doing something. Abet means to instigate or encourage by aid or countenance; to contribute as an [58] assistant or instigator in the commission of an offense. The owner of an establishment or business who has knowledge that an employee is maintaining a liquor nuisance therein is an aider and abettor and may be convicted as a principal";

on the ground that there was no evidence in this case of any agent of defendant making a sale and

no evidence upon which to base agency, and that the instruction would tend to and did confuse the jury, by inferring that some other person who was an employee of defendant may have made the sale complained of, and that if so, the defendant would be responsible therefor, all as contained in Exception No. 6, appearing on pages 24 and 25 of the bill of exceptions.

Which instruction has been heretofore assigned as Defendant's Exception No. 6.

VII.

The Court erred in denying the motion for a new trial made on behalf of the defendant and plaintiff in error after the verdict had been returned, but before the judgment of the Court had been entered. The grounds of said motion were as follows:

1. That the verdict in said cause is contrary to law.

2. That the verdict in said cause was not supported by the evidence in the case.

3. That the evidence in said cause is insufficient to justify said verdict.

4. That the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial, which errors were duly excepted to.

5. Newly discovered evidence, material to the defendant, which he could not, with reasonable diligence have discovered, and produced at the trial.

SPECIFICATIONS OF THE INSUFFICIENCY OF THE EVIDENCE TO JUSTIFY THE VERDICT. [59]

The defendant and plaintiff in error herein specifies the insufficiency of the evidence to justify the verdict as follows:

a. There is no evidence proving or tending to prove that James Dunn, said defendant and plaintiff in error, on the fourth day of July, 1930, at a place known as No. 301 Second Street, in the City of Eureka, California, maintained a or any common nuisance as presented in the first count of said Indictment.

b. That the evidence as produced by the Government was confined to a sale of six drinks purported to have been made by defendant at approximately 7:30 P. M. on the 26th day of June, 1930, to two Government agents. That there was no evidence of other violations or habitual sales, and likewise no evidence from which such acts may reasonably be deducted. That nuisance implies a continuity of action, and not a sale at one particular time.

c. That there was no evidence of any sale of liquor or any evidence showing that the same was kept for sale in said premises after June 26th, 1930, and that it will be presumed that the nuisance, if any existed on June 26th, 1930, was abated prior to July 4th, 1930, the date presented in the first count of the Indictment.

d. That the description of the person purported to have made the sale on June 26th, 1930, to the Gov-

ernment agents, does not conform with the actual description of defendant or any person employed by defendant, and working in said premises, as shown by the affidavit of Joe Dunn attached to the motion for a new trial, which avers in part that James Dunn, Joe Dunn, Charles Granger and Walter Kuchan worked in said premises. That each of said employees of defendant is described in said affidavit as follows, to wit:

Joe Dunn is six feet tall, weights one hundred and ninety-four pounds, has dark hair and eyebrows, has no teeth missing in the front of his mouth, has grey eyes, smooth shaven, age forty-seven years, white race. [60]

That Charles Granger is five feet six inches tall, weighs one hundred and eighty-five pounds, has grey hair and eyebrows, has false teeth but no teeth missing, brown eyes, has grey moustache, age seventy-two years, white race.

That Walter Kuchan is five feet eight inches tall, weighs between one hundred and forty and one hundred and forty-five pounds, dark hair, no teeth missing, brown eyes smooth shaven, age between forty and forty-five years, white race.

That the person selling the six drinks to them on June 26th, 1930, was described by the two Government agents as being five feet nine inches in height, weight about one hundred and eighty-five pounds, age fifty years, dark hair and eyes, smooth shaven, white race, with a tooth missing in upper jaw in front, all as duly *excepted in* Exception No. 7, contained on page 27 of the bill of exceptions.

VIII.

The Court erred in denying the motion in arrest of judgment made on behalf of the defendant and plaintiff in error. Said motion was made on the following grounds, to wit:

I.

That the verdict is contrary to law in that the evidence was confined solely to a sale at one time with no evidence of other violations or habitual sales, and likewise with no evidence from which such acts may reasonably be deducted. Therefore the penalty provided in the Act for unlawful sale would alone apply.

That the section penalizing as a nuisance the maintaining of premises on which liquor is sold, implies a continuity of action and not a single sale.

II.

That the verdict convicting the defendant of maintaining a nuisance and acquitting him of possession and sale is inconsistent, cannot be reconciled and cannot stand for the following reasons, to wit: The testimony of the Government was to the effect [61] that defendant made a sale of six drinks to two Government agents on June 26th, 1930. Of this sale the jury found the defendant not guilty. There was no evidence of any other sale by any other person whomsoever, and there was no evidence that any liquor other than the six drinks was ever sold or kept on said premises.

That by finding said defendant not guilty of said sale and not guilty of said possession the jury can-

not as a matter of law find defendant guilty of nuisance.

III.

That Count No. One of the Indictment on file herein does not present, state or charge facts sufficient to constitute a public offense under the laws of the United States against this defendant.

All as contained in Exception No. 8, appearing on page 27 in the bill of exceptions.

Which said ruling has been heretofore designated as Defendant's Exception No. 8.

WHEREFORE, defendant and plaintiff in error prays that for the reasons stated herein that the judgment rendered by the United States District Court for the Northern District of California, in this cause, be reversed.

JAMES DUNN,
Defendant,
By EUGENE S. SELVAGE,
CLIFFORD RUSSELL,
Attorneys for Defendant.

Service of the within assignment of errors is hereby admitted this 4 day of August, 1930.

GEO. J. HATFIELD,
United States Attorney.

[Endorsed]: Filed Aug. 4, 1930. [62]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON WRIT OF ERROR.

The Clerk of this court is hereby requested and directed to prepare and certify a transcript of the record in the above-entitled case for the use of the Circuit Court of the United States, by including therein the following:

Indictment.

Minutes of said court referring to the plea of not guilty as entered by defendant.

Bill of exceptions.

Verdict.

Motion to vacate verdict.

Motion for new trial.

Motion in arrest of judgment.

Judgment on verdict of guilty.

Petition for writ of error.

Assignment of errors.

Order allowing writ of error.

Certificate to transcript.

Original writ of error and citation on writ of error, with return to writ of error.

This praecipe.

Notice of filing praecipe.

CLIFFORD RUSSELL,
EUGENE S. SELVAGE,
Attorneys for Plaintiff in Error.

[Endorsed]: Filed Aug. 4, 1930. [63]

[Title of Court and Cause.]

NOTICE OF FILING PRAECIPE FOR TRANSCRIPT.

To GEORGE J. HATFIELD, United States Attorney:

Please take notice that on the —— day of Aug., 1930, the undersigned filed with the Clerk of this court a praecipe for the record to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit on writ of error sued out in the above cause, a copy of which praecipe is herewith served on you.

CLIFFORD RUSSELL,
EUGENE S. SELVAGE,
Attorneys for Plaintiff in Error.

Service of the within notice and copy of praecipe is hereby admitted this 4th day of Aug., 1930.

GEO. J. HATFIELD,
United States Attorney.

[Endorsed]: Filed Aug. 4, 1930. [64]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 64 pages, numbered from 1 to 64, inclusive, contain a full, true and correct transcript of certain records

and proceedings in the case of United States vs. James Dunn, No. 4718, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of twenty-six and 30/100 ($26.30) Dollars, and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, this 8th day of October, A. D. 1930.

[Seal] WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [65]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the

Northern District of California, wherein James Dunn is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable ————, United States District Judge for the Northern District of California, this 13th day of September, A. D. 1930.

FRANK H. KERRIGAN,
United States District Judge.

Service by receipt of copy admitted this 13th day of Sept., 1930.

ALBERT E. SHEETS,
D.,
Atty. for Pltff.

[Endorsed]: Filed Sep. 13, 1930. [66]

[Endorsed]: No. 6329. United States Circuit Court of Appeals for the Ninth Circuit. James Dunn, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed December 8, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6329

United States

Circuit Court of Appeals

For the Ninth Circuit.

JAMES DUNN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

PROCEEDINGS HAD IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

At a stated Term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-fifth day of May, in the year of our Lord one thousand nine hundred and thirty-one. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable JEREMIAH NETERER, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. Clifford A. Russell, counsel for the appellant, and by Mr. H. A. van der Zee, Assistant United States Attorney, counsel for the appellee, and submitted to the court for consideration and decision.

At a stated Term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the eighth day of June, in the year of our Lord one thousand nine hundred and thirty-one. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honor-

able WILLIAM H. SAWTELLE, Circuit Judge; Honorable JEREMIAH NETERER, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the Clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Before WILBUR and SAWTELLE, Circuit Judges, and NETERER, District Judge.

WILBUR, Circuit Judge.—Appellant was tried on an indictment containing three counts. He was acquitted upon the second and third counts and convicted upon the first count. Appellant contends that the verdicts are inconsistent and seeks a rever-

sal upon that ground. The liquor involved in the three counts is the same, five drinks of whiskey and one drink of beer. It is charged in the third count that this liquor was unlawfully sold on the 26th day of June, 1930. In the second count it is charged that this liquor was unlawfully possessed on the 4th day of July, and in the first count that the appellant maintained a common nuisance on the 4th day of July, 1930, at 301 Second Street, Eureka, Humboldt County, California, in keeping for sale at said place the liquor described in the second and third counts.

Upon the trial appellant testified, and his counsel stipulated, that he was the owner of the place above described. It appears from the evidence that this place was fitted up with a bar in a rear room and another in a cigar-store in a front room. The rear room was used as a pool-room and was fitted up for the sale of drinks. Appellant testified that the bar in the rear room was equipped with whiskey glasses in which he dispensed "bitters." Two prohibition officers testified they entered the premises with two unknown men, called for and paid for drinks which were served over the bar without any apparent attempt at secrecy. The prohibition officers identified the appellant as the person who sold them the drinks at the time and place in question. If the case had been submitted to the jury upon this evidence alone the question of the inconsistency of the verdict would present a somewhat different aspect than that presented by the record before us. The appellant took the stand on his own behalf and produced witnesses who testified to the effect that on the 26th day of June the appellant was not in the

premises at the time and place of sale, but was returning from a ranch about two hours distant, arriving there after the time of the alleged sale. In addition to this evidence the Government's witnesses were cross-examined with a view of creating a doubt as to the accuracy of their testimony concerning the identity of the person who sold the liquor to them at the time and place in question. The evidence, however, on all counts, related solely to a transaction on the 26th day of June, and there is no evidence of any sale or possession on the 4th of July. It is pointed out in the briefs, as it has been in a number of our decisions, that there is a conflict in the decisions of our Circuit Courts of Appeal upon the question of inconsistent verdicts.

The matter has been presented to this court in a number of cases in which this court has found it unnecessary to determine which line of authority it would adopt. This court has been able so far in cases presented to it to steer a middle course. Lambert vs. U. S., 26 F. (2d) 773; Hesse vs. U. S., 28 F. (2d) 770; U. S. vs. Anderson, 31 F. (2d) 436; Pankratz Lbr. Co. vs. U. S., (No. 6363) decided May 25, 1931. In U. S. vs, Anderson, *supra*, the decision was delivered by District Judge Bean. In that case it was held that where the verdicts were not legally inconsistent the verdict of guilty would not be reversed if it were supported by the evidence notwithstanding the fact that the acquittal upon some of the counts charging overt acts as separate offenses was difficult to reconcile with the verdict of the jury, stating in that connection:

"It may be difficult, in view of the rule that the act of one conspirator in furtherance of the object of the conspiracy is the act of all, to understand the reasoning of the jury in convicting Anderson on the conspiracy charge, and not the substantive offenses; but it is not for us to speculate on that question. It is enough that the verdict on the conspiracy charge is supported by the evidence and responds to the issue."

Our more recent opinion, delivered by Judge Neterer, is to the same effect, that is, that where the offense is separate and distinct and supported by the evidence, the fact that the acquittal of other defendants through whom the defendant corporation was acting, did not require the reversal of the conviction of the corporation, although the corporation acted through the defendants who were acquitted.

In the case at bar there is no legal inconsistency between an acquittal upon the charges of sale and possession and the conviction upon a charge of nuisance. The inconsistency, if any, arises from the fact that the evidence on behalf of the Government with reference to the three offenses is identical, and it is illogical for a jury to accept the testimony of these witnesses on one count and reject them on the other two. But this apparent inconsistency is largely dispelled by a consideration of the evidence offered by the defense. This evidence was calculated to, and no doubt did, raise a reasonable doubt in the minds of the jury as to whether or not the defendant personally sold the liquor to the Government

agents at the time and place in question. In view of the fact that the jury was instructed that the appellant might act through agents and employees and was instructed in effect that if he so acted through an agent or employee in possession or sale of liquor he was guilty as a principal of the illegal sale and illegal possession, the effect of the verdict is that the jury had a reasonable doubt as to whether or not the person who sold the liquor at the time and place in question was acting as the agent for and under the authority of the appellant. The evidence showed that appellant had several employees, including his brother, operating his place of business. The verdict of the jury on the first count shows that they are satisfied beyond a reasonable doubt that the premises were kept and maintained and liquor was there possessed for purposes of illegal sale, and while they are not able to say beyond a reasonable doubt that the actual sale was made by an authorized agent of the appellant, they were convinced that the appellant kept the liquor there for the purpose of sale. As pointed out in U. S. vs. Anderson, *supra,* it is not the province of this court to try to determine the basis for the verdict of the jury. Under our system of law the jury is the sole judge of the facts and the credibility of witnesses and their verdicts are not to be overturned because they seem illogical.

The case of Rosenthal vs. U. S., 276 Fed. 714, opinion by Judge Ross, is cited by the appellant in support of his contention. This decision was explained by the author thereof in a subsequent decision by this court involving an indictment con-

taining two counts, one charging unlawful possession of liquor, and the second charging the maintenance of a common nuisance by selling liquor in a designated place of business. In the latter case it is held that the record failed to show that the two alleged offenses related to the same transaction. The decision is criticised in an opinion by Judge Amidon, sitting in the Circuit Court of Appeals of the Eighth Circuit, 7 F. (2d) 615, 616. It is also cited in the same circuit in Morris vs. U. S., 7 F. (2d) 785. In Carrignan vs. U. S., 290 F. 189, in an opinion by Judge Evan A. Evans, the Rosenthal case was cited and distinguished from the case involving an unlawful sale of liquor, and the maintenance of a public nuisance on the ground that the latter were separate and distinct offenses, holding that an acquittal of the unlawful sale was not inconsistent with a conviction of maintaining a nuisance. Referring to Rosenthal vs. U. S., *supra,* it is said:

> "In that case [Rosenthal vs. U. S.] the defendant was charged with having purchased and received stolen property, with knowledge that it was stolen, and also charged by another count with having the same property in his possession, with like knowledge, the evidence showing that the two counts related to the same transaction. The second offense charged was but a part of the first offense, and separate convictions for the two alleged offenses could not have been sustained. It was therefore held that a verdict of not guilty on the first count necessarily relieved defendant from liability on the second count."

It is sufficient for the purposes of this case to say that the decision in Rosenthal vs. U. S., as explained later by its author in Baldini vs. U. S., 286 Fed. 133, in so far as it is inconsistent with the views we have expressed, is modified by our subsequent decisions hereinbefore cited.

The fact that the appellant interposed an alibi and thus raised a clear distinction as to the evidence to support the charges in the three counts of the indictment, together with his admitted ownership of the place in which it was charged that the common nuisance was maintained and the inferences with relation thereto resulting from the readiness with which intoxicating liquor was produced and sold in such place upon the request of four strangers, sufficiently differentiated the evidence as to the separate counts as to require an affirmance even under the rule most favorable to defendants as to inconsistent verdicts.

The appellant excepted to portions of the closing argument of the district attorney and assigned the making of said argument as misconduct. The argument excepted to was to the effect that inasmuch as the defendant has testified that his son and a boy friend, two ranch hands and two neighbors knew of his visit to his ranch on the day of the alleged sale of liquor by the appellant, that "any one of these would have established the fact that he was out there." The exception was on the ground that it was not incumbent on the defendant to produce any witnesses and that the witnesses were available to the United States attorney's office if they desired to

call them. The court, upon motion of the defendant, instructed the jury to "eliminate those remarks." A similar exception was made to the argument of the district attorney that the appellant had not "produced the man with the missing tooth." The court instructed the jury that the position of the appellant was correct, that it was not incumbent upon the defendant to prove his innocence, but it was incumbent upon the Government to prove the defendant guilty beyond a reasonable doubt. They were thereupon instructed to disregard the remarks made by the district attorney "with reference to the inability or failure of the defendant to produce a witness here with a missing tooth, or to produce any other witness." In view of the instruction of the trial court in response to the appellant's motion and in view of the verdict of the jury upon the two counts charging the appellant with having made the sale and having possessed the liquor, it is evident that the appellant was not harmed by the statement of the district attorney.

We do not wish to be understood as deciding whether or not the comment of the district attorney upon the failure to produce the witness referred to was erroneous. The question is one of some difficulty (Graves vs. U. S., 150 U. S. 118; Rostello vs. U. S., 36 Fed. 899; citing 16 Cor. Jur., sec. 1023; 10 R. C. L., sec. 886), and the action of the trial court in granting the motion of the appellant was a wise disposition of the matter.

A more serious breach of propriety on the part of the district attorney is the following statement:

"Now, the alibi is proved by one of the most contemptible methods that I have ever observed in a court." It is difficult to understand from the record the basis of the statement of the district attorney as to the "contemptible methods" used in establishing an alibi unless the term is used in the sense of "pitifully inadequate." However, the elaboration of the argument of the district attorney and the ground of objection thereto was directed wholly to the failure of the defendant to call corroborating witnesses who were available to him, and, as we pointed out, the error, if any, in that regard was cured by the action of the trial Judge. We may add here that being unable to see any justification for the use of the word "contemptible" or any basis in the record for such a claim, counsel were requested upon the argument to enlighten the court upon that subject, and in response to the question of the court it appears that the statement of the district attorney was predicated upon an answer elicited from one of the appellant's witnesses upon cross-examination by the district attorney himself and not by the accused. It is sufficient, however, to say that the matter was not effectively called to the attention of the court, and that the court instructed the jury to disregard "these remarks."

Judgment affirmed.

[Endorsed]: Opinion. Filed) June 8, 1931. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 6329.

JAMES DUNN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of California, Northern Division, and was duly submitted.

On consideration whereof, It is now here ORDERED AND ADJUDGED by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Jun. 8, 1931. Paul P. O'Brien, Clerk.

At a stated Term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the twenty-second day of July, in the year of our Lord one thousand nine hundred and thirty-one. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING.

Upon consideration thereof, and by direction of the court, IT IS ORDERED that the petition of appellant, filed June 27, 1931, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Mr. Clifford A. Russell, counsel for the appellant, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including September 22, 1931; and in the event the petition

for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California, August 20, 1931.

[Endorsed]: Filed Aug. 26, 1931. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-one (91) pages, numbered from and including 1 to and including 91 to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 15th day of September, A. D. 1931.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 2, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is advanced and assigned for argument on Monday, November 23rd after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.